



7020-02

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1151]

Certain Photovoltaic Cells and Products Containing Same; Notice of Commission Decision to Review in Part and, on Review, to Affirm With Modification an Initial Determination Granting Respondents' Motions for Summary Determination of Non-Infringement; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part and, on review, to affirm with modification an initial determination (“ID”) (Order No. 40) of the presiding administrative law judge (“ALJ”) granting respondents’ motions for summary determination of non-infringement. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal, telephone 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on April 9, 2019, based on a complaint filed on behalf of Hanwha Q CELLS USA, Inc. of Dalton,

Georgia and HQC-AMC¹ of Seoul, Republic of Korea (collectively, “Hanwha”). 84 *Fed. Reg.* 14134-35 (April 9, 2019). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain photovoltaic cells and products containing same by reason of infringement of certain claims of U.S. Patent No. 9,893,215. The complaint further alleges the existence of a domestic industry. The Commission’s notice of investigation named the following respondents: JinkoSolar Holding Co., Ltd., c/o Conyers Trust Company (Cayman) Limited of Grand Cayman KY1-111, Cayman Islands; JinkoSolar (U.S.) Inc. of San Francisco, California; Jinko Solar (U.S.) Industries Inc. of San Francisco, California; Jinko Solar Co., Ltd. of Jiangxi, China; Zhejiang Jinko Solar Co., Ltd. of Haining City, China; Jinko Solar Technology Sdn. Bhd. of Persekutuan, Malaysia (collectively, “Jinko”); LONGi Solar Technology Co., Ltd. of Shaanxi, China; LONGi Green Energy Technology Co., Ltd. of Shaanxi, China; LONGi (H.K.) Trading Ltd. of Wanchai, Hong Kong; LONGi (Kuching) Sdn. Bhd. of Sarawak, Malaysia; Taizhou LONGi Solar Technology Ltd. of Jiangsu, China; Zhejiang LONGi Solar Technology Ltd. of Zhejiang, China; Hefei LONGi Solar Technology Ltd. of Anhui, China; LONGi Solar Technology (U.S.) Inc. of San Ramon, California (collectively, “LONGi”); and REC Solar Holdings AS of Oslo, Norway; REC Solar Pte. Ltd. of Tuas, Singapore; and REC Americas, LLC of San Mateo, California (collectively, “REC”)

¹ Complainant HQC-AMC was subsequently replaced by Hanwha Solutions Corporation. Order No. 38 (Jan. 30, 2020), *unreviewed by Comm’n* Notice (Mar. 2, 2020); *see also* 85 *Fed. Reg.* 13182-83 (Mar. 6, 2020).

(collectively, “Respondents”). The Office of Unfair Import Investigations (“OUII”) is participating in the investigation.

On August 19, September 13, and September 18, 2019, LONGi, Jinko, and REC, respectively, filed a motion for summary determination on infringement. On September 26, 2019, the ALJ issued a *Markman* Order (Order No. 24), construing certain claim terms in dispute. On October 10, 2019, the ALJ issued Order No. 26, which struck Hanwha’s late-filed contentions concerning infringement under the doctrine of equivalents (DOE).

On April 10, 2020, the ALJ issued the subject ID (Order No. 40), granting Respondents’ motions for summary determination of non-infringement. The subject ID finds no literal infringement by any of the accused products. Although the ALJ struck Hanwha’s late-filed DOE contentions in Order No. 26, the ID also addresses the merits of the DOE contentions and finds no infringement by equivalents due to prosecution history estoppel.

On April 22, 2020, Hanwha filed a petition for review seeking review of the finding of no literal infringement. Hanwha does not seek review of the ALJ’s decision to strike its DOE contentions. On May 5, 2020, Respondents and OUII each filed a response in opposition to Hanwha’s petition.

Having reviewed the record including Order No. 24, the subject ID, the parties’ briefing before the ALJ, and Hanwha’s petition and responses thereto, the Commission has determined to review in part the subject ID (and underlying *Markman* Order). On review, the Commission has determined to affirm with modification the ID’s grant of summary determination. Specifically, the Commission clarifies that the findings made on pages 24-26 of the ID relate to statements made by the patentee during prosecution. The ID notes that those findings support the determination

that prosecution history estoppel precludes the application of the DOE with respect to the claim terms at issue. The Commission clarifies that these findings also support Order No. 24's claim construction of these terms, including a determination that prosecution disclaimer applies in construing these terms. As one example, the finding on page 25 of the ID that "the patentee 'made numerous and unambiguous' representations that the '215 patent claims solar cells hav[ing] a two-layer passivation stack, and no more" lends support to a finding of prosecution disclaimer and Order No. 24's construction of the claim terms at issue. *See, e.g., Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323-24 (Fed. Cir. 2003); *Trading Technologies Intern., Inc. v. Open E Cry, LLC*, 728 F.3d 1309, 1322 (Fed. Cir. 2013) ("a single action during prosecution can engender both a prosecution *disclaimer* and *prosecution history estoppel*.")) (emphasis in original).

The investigation is terminated with a finding of no violation of section 337.

The Commission vote for this determination took place on June 3, 2020.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: June 3, 2020.

Lisa Barton,

Secretary to the Commission.

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